IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1901.

JOHN E. SEXTON,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.

MOTION TO DISMISS OR TO AFFIRM.

Comes now the defendant in error, by its attorney and counsel, appearing in that behalf, and moves the Court to dismiss the writ of error in the above entitled cause for want of jurisdiction and because the judgment or decree which is sought to be reviewed by said writ is a judgment or decree duly given, made and entered, by the Supreme Court of the State of California, and that it fully appears from the record herein:

FIRST.—That no Federal question properly arose in the cause in which said judgment or decree complained of was made, nor in the judgment or decree of the Supreme Court of California therein, nor in any decree, judgment, act, or proceeding therein, nor in any judgment, act, or proceeding sought to be reviewed under this writ.

SECOND.—That it does not appear from the record in this cause that the decision or judgment and decree of the State court complained of was or is repugnant to the Constitution, or to any treaty, or to any law, of the United States.

THIRD.—That the only errors assigned by the plaintiff in error in this cause are that the Supreme Court of the State of California erred in said action in deciding therein that Section 518 of the Penal Code of the State of California is not in conflict with, and is not repugnant to, the provisions of Section 1, Article III, and with Section 1 of Article XIV of the Constitution of the United States, and with Section 711 and with Section 5484 of the Revised Statutes of the United States.

FOURTH.—That Sections 518 and 519 of the Penal Code of the State of California are not in conflict with, and are not repugnant to, the provisions of Section 1 of Article III, nor with Section 1 of Article XIV of the Constitution of the United States, nor with Section 711 and with Section 5484 of the Revised Statutes of the United States.

MOTION TO AFFIRM.

And the said defendant in error, by its attorney and counsel, as aforesaid, also moves the Court to affirm the judgment and decree, to review which said writ of error was herein ordered, although the record in said case may show that this Court has jurisdiction of the premises, which said motion to affirm is made for the following reasons, to wit:

FIRST.—Because of each and all of the reasons and grounds above specified.

SECOND.—That it is manifest from the record herein that the reasons assigned for the taking of the writ were and are frivolous, and that it was taken for delay only.

TIREY L. FORD,
Attorney-General of the State of California, and
C. N. POST,
Assistant Attorney-General of the State of California,
Attorneys for Defendant in Error.

In the Supreme Court of the United States.

October Term, 1901.

JOHN E. SEXTON,
Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.

NOTICE OF SUBMISSION OF MOTIONS TO DISMISS AND AFFIRM.

To George D. Collins, Esq., Attorney for Plaintiff in Error:

Please take notice that on Monday, the 4th day of November, A. D. 1901, at the opening of the court, or as soon thereafter as counsel can

be heard, the motions, of which the foregoing are copies, will be submitted to the Supreme Court of the United States at the courtroom of said court, in the Capitol Building, in Washington, D. C., for the decision of said court thereon. Annexed hereto is a copy of the brief or argument to be submitted with said motions in support thereof.

TIREY L. FORD,
Attorney-General of the State of California, and
C. N. POST,
Assistant Attorney-General of the State of California,
Attorneys for Defendant in Error.

STATEMENT OF THE CASE.

This is a motion to dismiss or affirm an appeal taken by the plaintiff in error, John E. Sexton, from the final judgment and decree of the Supreme Court of the State of California affirming the judgment rendered in favor of the defendant in error in the Superior Court of the State of California, in and for said County of El Dorado, in said State.

THE INDICTMENT.

The above entitled cause was prosecuted by indictment, a copy of which indictment, with the endorsements thereon, was and is in the words and figures following, that is to say:

"In the Supreme Court of the State of California.

"INDICTMENT FOR EXTORTION.

"In the Superior Court of the County of El Dorado, State of California. The 25th day of November, A. D. 1899.

"THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
"JOHN E. SEXTON AND S. H. BRIGGS.

"John E. Sexton and S. H. Briggs are accused by the grand jury of the said County of El Dorado, by this indictment, of the crime of extortion, committed as follows, to wit: The said John E. Sexton and S. H. Briggs, prior to the finding of this indictment, and on or about the 20th day of June, A. D. 1898, at the County of El Dorado, State of California, did wilfully, unlawfully and feloniously obtain from one C. Greenewald certain personal property

consisting of money, the property of the said C. Greenewald, to the amount and value of thirty dollars, with the consent of said Greenewald induced by the wrongful use and exercise upon him of fear by means of a threat then and there made by the said John E. Sexton and S. H. Briggs to accuse him, the said Greenewald, of the crime of having, in violation of the laws of the United States of America, sold and delivered cigars in a form other than in a new box not before used for the purpose of packing cigars therein, contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the People of the State of California.

"ABE DARLINGTON,
"District Attorney.

"Witnesses sworn and examined before the Grand Jury: C. Greenewald, I. Jacobs, Kate Thompson and John E. Sexton.

"(Endorsed:)
"1256.
"In the Superior Court of El Dorado, State of California.
"The People of the State of California against John E. Sexton and S. H. Briggs.
"Indictment for extortion.
"A true bill.

"R. P. PATTERSON,
"Foreman of the Grand Jury.

"Presented and filed in open Superior Court on this the 25th day of November, 1899.

"JOHN P. FISHER,
"Clerk."

PROCEEDINGS IN SUPERIOR COURT.

After the finding of the above indictment such proceedings were had in the Superior Court of the State of California, in and for the County of El Dorado, in said State, that a verdict of guilty was rendered against the defendant therein (plaintiff in error here) and a judgment of conviction entered in pursuance of said verdict.

PROCEEDINGS IN SUPREME COURT OF CALIFORNIA.

An appeal was taken from the judgment entered in said Superior Court to the Supreme Court of the State of California, wherein such proceedings were had that thereafter, to wit, on the 26th day of February, 1901, the Supreme Court of the State of California rendered its judgment in said case against the appellant therein (the plaintiff in error here), and thereafter, to wit, on the 28th day of March, A. D. 1901, said Court denied the petition of said appellant (plaintiff in error here) for a rehearing in said cause.

OPINION OF SUPREME COURT OF CALIFORNIA.

The Supreme Court of the State of California, in making and entering its judgment in said cause, filed therein the following opinion and order:

"Appeal from the Superior Court of El Dorado County.—M. P. Bennett, Judge.

"For Appellant, F. Adams, James W. Keyes, Clarke Howard.

"For Respondent, Attorney-General Ford.

"Filed February 26, 1901.

"DEPARTMENT ONE.

"THE PEOPLE OF THE STATE OF CALIFORNIA, "Plaintiff and Respondent, vs. "JOHN E. SEXTON, "Defendant and Appellant.	Crim. No. 651.

"Defendant has been convicted of the crime of extortion, and appeals to this Court. By the indictment it was alleged that defendant obtained thirty dollars from one Greenwald under fear induced by threats upon the part of defendant to accuse him (Greenwald) of the 'crime of having, in violation of the laws of the United States of America, sold and delivered cigars in a form other than in a new box not before used for the purposes of packing cigars therein.' In substance it may be said that defendant threatened to accuse Greenwald of violating the United States revenue laws, and under fear induced by such threat secured from Greenwald the aforesaid sum of thirty dollars.

"It is insisted that the facts alleged do not constitute an offense against the laws of the State of California, but, upon the contrary, constitute a crime exclusively within the jurisdiction of the Federal court. We find nothing in this contention. The defendant is charged with the crime of extortion, an offense directly within the jurisdiction of the State courts. He is not charged with a violation of the Federal statute, but with a violation of a State statute. He threatened to accuse a man with the commission of a crime. It makes no difference if that crime be solely triable in the Federal courts, for defendant is not being tried for that crime. If he had threatened to have Greenwald arrested upon the charge of counterfeiting the money of this country, and was charged with the crime of extortion for that reason, clearly his offense would be one against the laws of this State. It would be extortion as defined by the Penal Code of this State, and this Court would not be concerned as to whether or not defendant's crime was also punishable under Federal laws. The Court finds no substantial defect in the indictment, and the demurrer thereto is not well taken.

"A demurrer to a previous indictment laid against defendant was sustained, and the case referred to a second Grand Jury, which Grand Jury returned the indictment now before the Court. It is

insisted that defendant's second prosecution should have been based upon a preliminary examination, and an information filed thereon. There is no merit in this position. When Section 1008 of the Penal Code says that after such order of resubmission the defendant 'may be examined before a magistrate,' the word *may* takes its usual, ordinary meaning, and is not to be construed as *must*.

"The stenographer who was present and took the testimony before the Grand Jury was sworn as a witness, and testified as to certain evidence given by defendant before that body. This evidence in no sense amounted to a confession, and hence no question of duress or menace upon the part of defendant at the time he gave his testimony is involved herein. Under such circumstances defendant's statements, whether made in the Grand Jury room, at the trial, or extra judicial, may be used against him, and we see no error in their admission here. The stenographer had the right to read from her notes of his evidence taken at the time, if she was so inclined. The statute contemplates that she may thus refresh her recollection. (Section 2047, C. C. P.; Burbank vs. Dennis, 101 Cal. 104.)

"We find nothing further in the record demanding consideration.

"While the evidence tending to support the verdict in this case is very weak, we are not prepared to say it is insufficient. Owing to the peculiar circumstances of the case, and the character of the evidence relied upon to support the verdict, we think the law would have been well satisfied with a judgment finding the defendant guilty of a misdemeanor. But that is a matter beyond review by this Court.

"For the foregoing reasons the judgment and orders are affirmed.

"GAROUTTE, J.

"We concur:

"VAN DYKE, J.,

"HARRISON, J."

ASSIGNMENT OF ERROR.

The following is a full and complete copy of the assignment of errors filed herein by plaintiff in error:

"JOHN E. SEXTON,

Plaintiff in Error,

vs.

"THE PEOPLE OF THE STATE OF CALIFORNIA,

Defendant in Error.

"Of October Term, in the year of our Lord one thousand nine hundred.

"Afterwards, to wit, on the 30th day of March, A. D. 1901, in the same term, before the Justices of the Supreme Court of the United States, comes the said John E. Sexton, by Mr. George D. Collins,

his counsel, and says that in the record and proceedings in the action of the People of the State of California vs. John E. Sexton, Crim. No. 651 in the Supreme Court of the State of California, there is manifest error in this, to wit:

"1. That the Supreme Court of the State of California committed manifest error in said action in deciding therein that Section 518 of the Penal Code of the State of California is not in conflict with and is not repugnant to the provisions of Section 1 of Article III, and with Section 1 of Article XIV of the Constitution of the United States, and with Section 711 and Section 5484 of the Revised Statutes of the United States.

"2. That your petitioner, defendant in said action, is by the judgment of the Superior Court in and for the County of El Dorado, and by the said judgment of the Supreme Court of the State of California affirming said judgment of said Superior Court, deprived of his liberty without due process of law, and is denied the equal protection of the law, contrary to the provisions of Section 1 of Article XIV of the Constitution of the United States.

"Whereas, by the law of the land, said judgment of the Supreme Court of the State of California ought to have been given for the said John E. Sexton, plaintiff in error, and against the People of the State of California, defendant in error; and the said plaintiff in error, the said John E. Sexton, prays the judgment of the Supreme Court of the State of California to be reversed, annulled and altogether held for nothing, and that he be restored to all things which he hath lost by occasion of the said judgment.

"GEORGE D. COLLINS,
"Attorney for Plaintiff in Error, John E. Sexton.

"(Endorsed:) Filed Mar. 30, 1901. Geo. W. Root, Clerk, by W. E. Boody, Deputy."

ARGUMENT.

We shall argue

1. That this Court has no jurisdiction over the questions or the subject-matter presented by the writ of error herein, for that no Federal question properly arises therein.

2. That Sections 518 and 519 of the Penal Code of the State of California are not in conflict with, and are not repugnant to, the provisions of Section 1 of Article III, nor with Section 1 of Article XIV of the Constitution of the United States, nor with either Section 711 or Section 5484 of the Revised Statutes of the United States.

3. That it is manifest that the writ of error herein was taken for delay only, and that no other or different judgment could have been lawfully entered therein by the Supreme Court of the State of California.

FIRST POINT.

Section 518 of the California Penal Code is not in Conflict with, nor Repugnant to, Section 1 of Article III, Section 1 of Article XIV of the Constitution of the United States, nor with Sections 711 and 5484 of the U. S. Revised Statutes.

The only questions herein presented by the record are thus stated in plaintiff's assignment of errors:

> "1. That the Supreme Court of the State of California committed manifest error in said action in deciding therein that Section 518 of the Penal Code of the State of California is not in conflict with, and is not repugnant to, the provisions of Section 1 of Article III and with Section 1 of Article XIV of the Constitution of the United States, and with Section 711 and Section 5484 of the Revised Statutes of the United States.
>
> "2. That your petitioner, defendant in said action, is by the judgment of the Superior Court in and for the County of El Dorado, and by the said judgment of the Supreme Court of the State of California affirming said judgment of said Superior Court, deprived of his liberty without due process of law, and is denied the equal protection of the law, contrary to the provisions of Section 1 of Article XIV of the Constitution of the United States."

Plaintiff, in his foregoing assignment of errors, has seen fit to incorporate therein only Section 518 of the Penal Code of California, which section defines generally the crime of extortion and is as follows:

> Sec. 518. "Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right."
>
> Section 518, Penal Code.

It is Section 519 of said Code, however, that specifically defines the threats which may induce the "fear" mentioned in Section 518, and by which alone the crime of extortion may be committed by the wrongful use of "fear."

Said Section 519 provides as follows, to wit:

> Sec. 519. "Fear such as will constitute extortion may be induced by a threat, either:
>
> "1. To do an unlawful injury to the person or property of the individual threatened, or to any relative of his, or member of his family; or
>
> "2. To accuse him, or any relative of his or member of his family, of any crime; or
>
> "3. To expose, or impute to him or them, any deformity or disgrace; or
>
> "4. To expose any secret affecting him or them."
>
> Section 519, Penal Code.

(It will be observed that the indictment herein charges in the language of both of said sections of the California Penal Code.)

Section 1 of Article III, and Section 1 of Article XIV of the Constitution of the United States, and Section 711 and Section 5484 of the Revised Statutes of the United States, referred to in the foregoing assignment of errors, read as follows:

> Sec. 1. "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office."
>
> Sec. 1, Art. III, Constitution.

> Sec. 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
>
> Sec. 1, Art. XIV, Constitution.

> Sec. 711. "The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States.
>
> "First—Of all crimes and offenses cognizable under the authority of the United States. * * *"
>
> Sec. 711, Revised Statutes of the United States.

> Sec. 5484. "Every person who shall receive any money or other valuable thing under a threat of informing, or as a consideration for not informing, against any violation of any internal-revenue law, shall, on conviction thereof, be punished by a fine not exceeding two thousand dollars, or by imprisonment not exceeding one year, or both, at the discretion of the court, with costs of prosecution."
>
> Sec. 5484, Revised Statutes of the United States.

It thus affirmatively appears that the sole questions involved herein are whether or not Sections 518 and 519 of the Penal Code of California are in conflict with and repugnant to Section 1 of Article III, and Section 1 of Article XIV, of the Constitution of the United States, and Sections 711 and 5484 of the Revised Statutes of the United States.

We shall first discuss the relation of Sections 518 of the Penal Code of California to Section 1 of Article III of the Federal Constitution.

Section 518 of the Penal Code of California, *supra*, simply defines in general terms the crime of extortion, and it is not in conflict with, nor repugnant to, Section 1 of Article III of the Federal Constitution, unless it shall be held, that, by said section of the Federal Constitution, and said Section 711 of the Revised Statutes, the Federal courts were granted, in express terms, exclusive jurisdiction of the crime of extortion, or that jurisdiction over said crime was granted thereby to the Federal courts and prohibited to State courts, or that jurisdiction over said crime having been by said sections of the Federal Constitution and Revised Statutes, granted to the Federal courts, an exercise of similar jurisdiction by State courts would be utterly incompatible therewith. Article III of the Constitution of the United States, and its operation on the jurisdiction of State courts, was very thoroughly discussed in the comparatively recent case of

P. T. Fruit Co. vs. Henderson, Sup. Ct. Rep. 686–9.

Mr. Justice Harlan delivered the opinion of the Court, and said:

"These questions were the subject of earnest consideration while the Constitution was before the people of the United States for acceptance or rejection. It was contended by some who recommended its rejection that the proposed Constitution, without legislation by Congress, would give to the one Supreme Court established by it, and to such other courts as Congress should from time to time create, exclusive jurisdiction in all such cases or controversies. That interpretation was disputed, and Hamilton, in the Federalist (page 607), said: 'The principles established in a former paper teach us that the State will retain all preëxisting authorities, which may not be exclusively delegated to the Federal head, and that this exclusive delegation can only exist in one of three cases: Where an exclusive authority is, in express terms, granted to the Union; or where a particular authority is granted to the Union, and the exercise of a like authority is prohibited to the States; or where an authority is granted to the Union, with which a similar authority in the States would be utterly incompatible. Though these principles may not apply with the same force to the judiciary as to the legislative power, yet I am inclined to think that they are, in the main, just with respect to the former as well as the latter. And, under this impression, I shall lay it down as a rule that the State courts will retain the jurisdiction they now have, unless it appears to be taken away in one of the enumerated modes.' He recognized the fact that there was apparent support to the objection referred to in the clause 'the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress shall from time to time ordain and establish.' That clause, he said, 'might either be construed to signify that the supreme and subordinate courts of the Union should alone have the power of deciding those causes to which their

authority is to extend, or simply to denote that the organs of the national judiciary should be one Supreme Court and as many subordinate courts as Congress should think proper to appoint; in other words, that the United States should exercise the judicial power with which they are to be invested through one supreme tribunal and a certain number of inferior ones, to be instituted by them. The first excludes, the last admits, the concurrent jurisdiction of the State tribunals. And, as the first would amount to an alienation of State power by implication, the last appears to me the most defensible construction.' He also said that the judicial power of every government 'looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those in Japan, not less than of New York, may furnish the objects of legal discussion to our courts. When, in addition to this, we consider the State governments and the National government, as they truly are, in the light of kindred systems, and as parts of one whole, the inference seems to be conclusive that the State courts would have a concurrent jnrisdiction in cases arising under the laws of the Union, where it was not expressly prohibited.' (Federalist, No. 82.)

"The first Congress acted upon this view of the scope and effect of the Constitution when it passed the judiciary act of 1789, creating the Circuit and District Courts of the United States, and defining their jurisdiction."

P. T. Fruit Co. vs. Henderson, Sup. Ct. Rep. 686–689.

We have quoted only a small portion of this opinion, but desire to cite it all, and we confidently assert that the reasoning contained and the authorities cited therein are diametrically opposed to either of the three constructions of said Section 1 of Article III, suggested by us as being necessary to support plaintiff's contention.

We will next consider whether or not said Section 518 of the California Penal Code is in conflict with, or repugnant to, Section 1 of Article XIV of the Federal Constitution.

A. The only manner in which said section of the California Penal Code could conflict with or be repugnant to said Section 1 of Article XIV would be in that it abridges the privileges or immunities of citizens of the United States, or deprives persons of life, liberty, or property without due process of law, or denies to persons within the jurisdiction of said State the equal protection of the law.

That said California penal section does not abridge the privileges or immunities of citizens of the United States is clearly decided in the

Slaughter-House Cases, 16 Nall. 36–83.

Mr. Justice Miller delivered the opinion of the Court, and we quote the following therefrom, to wit:

"The next observation is more important in view of the arguments of counsel in the present case. It is that the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.

"It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.

"We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States. The argument, however, in favor of the plaintiffs rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same.

"The language is, 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of *the United States*.' It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which preceded it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

"Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment."

Slaughter-House Cases, 83 U. S. Rep. 73–74.

In the recent case of

Anderson vs. The United States, Supreme Court Rep., Vol. 18,

Mr. Justice Harlan, in delivering the opinion of the Court, quoted the above quoted language from the Slaughter-House Cases with approval.

We quote from Anderson vs. The United States, *supra*, as follows, to wit:

> "It cannot be doubted that each of the original States had, prior to the adoption of the Constitution, complete and exclusive jurisdiction, by its judicial tribunals, over all legal questions, of whatsoever nature, capable of judicial determination, and involved in any case within its limits between parties over whom it could exercise jurisdiction. (Tennessee vs. Davis, 100 U. S. 257.)
>
> "If it was intended to withdraw from the State authority to determine, by its courts, all cases and controversies to which the judicial power of the United States was extended, and of which jurisdiction was not given to the national courts exclusively, such a purpose would have been manifested by clear language. Nothing more was done by the Constitution than to extend the judicial power of the United States to special cases and controversies; leaving to the Congress to determine whether the courts to be established by it from time to time should be given exclusive cognizance of such cases or controversies, or should only exercise jurisdiction concurrent with the courts of the several States.
>
> "And in Robb vs. Connolly, 111 U. S. 624, 636, 4 Sup. Ct. 544, it was held that, in defining and regulating the jurisdiction of the courts of the United States, Congress has taken care not to exclude the jurisdiction of the State courts from every case to which by the Constitution the judicial power of the United States extends. The reason given for this view was that upon the State courts, equally with the courts of the Union, rested the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States, and the laws made in pursuance thereof, whenever those rights were involved in any suit or proceeding before them; for, the court said, 'the judges of the State courts are required to take an oath to support that Constitution, and they are bound by it, and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, anything in the Constitution or laws of any State to the contrary notwithstanding.'"
>
> Vol. 18, Sup. Ct. Rep., 688–689.

B. Said Penal Section 518 of California does not deprive any person of life, liberty, or property without due process of law; it is a statute of general application, and every citizen of California is alike amenable to its provisions.

When a person accused of crime within a State is subjected, like all other persons in the State, to the law in its regular course of administration in courts of justice, the judgment so arrived at cannot be held to be such an unrestrained and arbitrary exercise of power as to be utterly void.

The Fourteenth Amendment to the Constitution was not designed to interfere with the power of a State to protect the lives, liberty, and

property of its citizens, nor with the exercise of that power in the adjudications of the courts of the State in administering the process provided by its laws.

In re Converse, 137 U. S. 624–631;
Leeper vs. Texas, 139 U. S. 467–468.

This Court, in the case of Hurtado vs. California, 110 U. S. 516, held that a prosecution as prescribed by the Constitution and laws of California was a prosecution by due process of law within the meaning of that phrase as used in the Fourteenth Amendment to the Constitution of the United States. That the meaning of the words "due process of law" in the Fourteenth Amendment refers to that law of the land in each State which derives its authority from the inherent and reserved powers of the State, and in so holding quoted with approval from two former decisions of this Court, as follows:

> "A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by common law cannot be taken away without due process; but the law, itself, as a rule of conduct, may be changed at the will or even at the whim of the Legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances."
>
> Munn vs. Illinois, 94 U. S. 113.

> "A trial by jury in suits at common law pending in State courts is not, therefore, a privilege or immunity of national citizenship which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. Due process of law is process according to the law of the land. This process in the States is regulated by the law of the State."
>
> Walker vs. Savinet, 92 U. S. 90.

The Hurtado case has been followed and affirmed in:

Norstrom vs. Washington, 164 U. S. 705;
Creamer vs. Washington, 168 U. S. 124;
Durrant vs. Hale, 168 U. S. 705.

C. Said Penal Section 518 of California does not deny to any person within the jurisdiction of that State the equal protection of the law,

because it is a statute of general application, and every person within the State is amenable to its provisions.

D. Said Section 518 is not in conflict with, nor repugnant to, Sections 711 and 5484 of the Revised Statutes, for the same reasons that it is not in conflict with, nor repugnant to, Section 1 of Article III, and Section 1 of Article XIV of the Constitution of the United States.

SECOND POINT.

Section 519 of the Penal Code of California is, within the Jurisdiction of that State, Concurrent with Section 5484 of the Revised Statutes of the United States.

For the same reasons that we gave in support of the constitutionality of said Section 518, *supra*, we contend that Section 519 of the California Penal Code is not obnoxious to the constitutional objections urged by plaintiff against said Section 518, and we will cite other authorities in addition in support of Section 519.

It is true that one of the provisions of subdivision 2 of Section 519 contemplates the same offense contemplated by Section 5484 of the Revised Statutes of the United States, and that is all there is of plaintiff's case.

In addition to the contention that said Section 519 is not in conflict with, nor repugnant to, the said Federal statutes and constitutional provisions under the reserved police powers of the sovereign State of California, we also contend that in prosecutions had by the State of California under said Section 519, said State exercises a concurrent power which has been recognized and approved by this Court time and again, and in support thereof we cite the following authorities:

"Whatever is contrary to public policy or inimical to the public interests is subject to the police power of the State."

L. & N. Railroad vs. Kentucky, 161 U. S. 701;
Beer Company vs. Massachusetts, 97 U. S. 25–34;
Stone vs. Mississippi, 701 U. S. 818.

"The Fourteenth Amendment does not limit the subjects in relation to which the police power of the State may be exercised for the protection of its citizens."

M. & St. L. R. Co. vs. Beckwith, 129 U. S. 33;
Barbier vs. Connolly, 113 U. S. 27–31.

Said Mr. Justice Story, delivering the opinion of the Court in case of Houston vs. Moore, 5 Wheat. 48–49:

"The Constitution containing a grant of powers in many instances similar to those already existing in the State governments, and some of these being of vital importance also to State authority and State legislation, it is not to be admitted that a mere grant of such powers in affirmative terms to Congress does, *per se*, transfer an exclusive sovereignty on such subjects to the latter. On the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion that the powers so granted are never exclusive of similar powers existing in the States, unless where the Constitution has expressly in terms given an exclusive power to Congress, or the exercise of a like power is prohibited to the States, or there is a direct repugnancy or incompatibility in the exercise of it by the States. The example of the first class is to be found in the *exclusive* legislation delegated to Congress over places purchased, by the consent of the Legislature of the State in which the same shall be, for forts, arsenals, dockyards, etc.; of the second class, the prohibition of a State to coin money or emit bills of credit; of the third class, as this Court have already held, the power to establish an uniform rule of naturalization, and the delegation of admiralty and maritime jurisdiction. In all other cases not falling within the classes already mentioned, it seems unquestionable that the States retain concurrent authority with Congress, not only upon the letter and spirit of the Eleventh Amendment to the Constitution, but upon the soundest principles of general reasoning."

"The United States court does not desire to be understood in any manner whatever to doubt or to interfere with the police power belonging to the States in virtue of their general sovereignty. That police power extends over all subjects within the territorial limits of the States, and has never been conceded to the United States."

Prigg vs. Com. of Pennsylvania, 41 U. S. 625;

Fertilizing Co. vs. Hyde Park, 97 U. S. 667.

Said the Court in a case wherein the question of commercial regulation was being discussed:

"In Gibbons against Ogden, 9 Wheaton, 204, the Court say, if a State, in passing laws on a subject acknowledged to be within its control, and, with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other which remains with the State, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers are identical. Although the means used in their execution may sometimes approach each other, so nearly as to be con-

founded, there are other situations in which they are sufficiently distinct to establish their individuality.

"In page 209, the Court say: Since, however, in regulating their own purely internal affairs, whether of trading or of police, the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to an Act of Congress passed in pursuance of the Constitution; they would inquire whether there was such collision in that case, and they came to the conclusion that there was.

"From this it appears that whilst a State is acting within the legitimate scope of its power as to the end to be attained, it may use whatsoever means, being appropriate to that end, it may think fit; although they may be the same, or so nearly the same, as scarcely to be distinguishable from those adopted by Congress acting under a different power; subject only, say the Court, to this limitation, that in the event of collision, the law of the State must yield to the law of Congress. The Court must be understood, of course, as meaning that the law of Congress is passed upon the subject within the sphere of its power.

"Even then, if the section of the Act in question could be considered as partaking of the nature of a commercial regulation, the principle here laid down would save it from condemnation, if no such collision exist."

City of New York vs. Miln, 11 Pet. 136–7.

"Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The Legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. (Boyd vs. Alabama, 94 U. S. 645.)"

Beer Co. vs. Massachusetts, 94 U. S. 33.

This same doctrine is most forcibly announced by Mr. Justice Grier, in his concurring opinion, in the case of

The License Cases, 5 How. 631,

from which we quote as follows:

"It has been frequently decided by this Court, 'that the powers which relate to merely municipal regulations, or what may more properly be called internal police, are not surrendered by the States, or restrained by the Constitution of the United States; and that, consequently, in relation to these, the authority of a State is complete, unqualified, and conclusive.' Without attempting to

define what are the peculiar subjects or limits of this power, it may safely be affirmed that every law for the restraint and punishment of crime, for the preservation of the public peace, health, and morals, must come within this category."

In the case of Cross vs. North Carolina, 132 U. S. 139, wherein the plaintiff in error had been convicted of forgery in the State courts of North Carolina, the contention here was that the offense of which he was convicted was cognizable only in the courts of the United States under Section 5209, Revised Statutes of the United States.

This Court held that the crime contemplated by Section 5209, Revised Statutes of the United States, did not necessarily involve the crime of which plaintiff in error had been convicted in the State courts of North Carolina, and the judgment was affirmed; but in so holding, this Court, speaking through Mr. Justice Harlan, used the following language, to wit:

> "The argument on behalf of the plaintiffs in error fails to give effect to the established doctrine that the same act or series of acts may constitute an offense equally against the United States and the State, subjecting the guilty party to punishment under the laws of each government. This doctrine is illustrated in United States vs. Marigold, 9 How. 560, 569; Fox vs. Ohio, 5 How. 410, 433; Moore vs. Illinois, 14 How. 13, 19; and Ex parte Siebold, 100 U. S. 371, 390; in the first of which cases it was said that 'the same act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the State and Federal governments, and might draw to its commission the penalties denounced by either as appropriate to its character in reference to each.'"
>
> Cross vs. North Carolina, 132 U. S. 139.

This same doctrine was again laid down by this Court in the case of

In re Loney, 134 U. S. 375,

wherein Cross vs. North Carolina, *supra*, and other cases were cited with approval, and the following language used by Mr. Justice Gray, who delivered the opinion of the Court, to wit:

> "There are cases (the most familiar of which are those making and uttering counterfeit money) in which the same act may be a violation of the laws of the State, as well as the laws of the United States, and punishable by the judiciary of either. (Fox vs. Ohio, 5 How. 410; United States vs. Marigold, 9 How. 560; Moore vs. Illinois, 14 How. 13; Ex parte Siebold, 100 U. S. 371–390; Cross vs. North Carolina, 132 U. S. 131.)"

Mr. Justice Gray, in delivering the opinion of the Court in the case of In re Green, 134 U. S. 378,

said:

"The question whether the State has concurrent power with the United States to punish fraudulent voting for Representatives in Congress is not presented by the record before us. It may be that it has. (Ex parte Siebold, 100 U. S. 371.)"

THIRD POINT.

It Is Manifest that the Writ of Error Was Taken for Delay Only, and that No Other or Different Judgment Could Have Been Lawfully Entered Herein by the Supreme Court of the State of California.

Should the Court conclude that it has jurisdiction to consider the question of the alleged conflict between Sections 518 and 519 of the California Code, and said sections of the Federal Constitution and Revised Statutes, then we have not the slightest doubt but that the motion to affirm the judgment will be granted, for the reason that a consideration of the law and the record in this case demonstrates so clearly that plaintiff has not been deprived of due process of law as to make it distinctly manifest that the writ herein was taken solely for delay, and that the question upon which jurisdiction depends is so frivolous as not to need further argument.

Swope vs. Leffingwell, 105 U. S. 3;
Evans vs. Brown, 109 U. S. 180;
Foster vs. Kansas, 112 U. S. 205;
Chamite City vs. Trader, 132 U. S. 211;
The Alaska, 130 U. S. 201;
Northern Pacific R. R. Co. vs. Amato, 144 U. S. 465;
Douglass vs. Wallace, 161 U. S. 346;
Richardson vs. Louisville, etc. R. R. Co., 69 U. S. 128.

Where the appellant has a color of right to the dismissal of the appeal, he may unite with a motion therefor one to affirm the decree on the ground that the constitutionality of the statute was settled by its former decision, or that it was taken for delay only.

Hinckley vs. Morton, 103 U. S. 764;
Foster vs. Kansas, 112 U. S. 205;

Evans vs. Brown, 109 U. S. 180;
Chanute City vs. Trader, 132 U. S. 211;
Swope vs. Leffingwell, 105 U. S. 3;
Northern Pacific R. Co. vs. Amato, 144 U. S. 465;
Douglas vs. Wallace, 161 U. S. 346;
Richardson vs. Louisville, etc., R. R., 169 U. S. 128;
The Alaska, 130 U. S. 201;
Crane Iron Co. vs. Hoagland, 108 U. S. 5;
Carey vs. Houston, etc., Co., 150 U. S. 170;
Texas Land & Cattle Co. vs. Scott;
Callan vs. Bransford, 139 U. S. 197;
Aspen, etc., Co. vs. Billings, 150 U. S. 31;
National Bank, etc., vs. Anderson, 172 U. S. 573;
Bienville Water, etc., Co. vs. Mobile, 175 U. S. 109;
Abbott vs. Tacoma Bank of Commerce, 175 U. S. 409.

Respectfully submitted.

TIREY L. FORD,
Attorney-General of the State of California,
C. N. POST,
Assistant Attorney-General of the State of California,
Attorneys for Defendant in Error.